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January 26, 1994

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

EX PARTE

Re: GN Docket No. 93-252

Dear Mr. Caton:

Pursuant to Section 1.1206(a) of the Commission's Rules, this is to notify you that the Utilities Telecommunications Council (UTC), made a written presentation today to the Office of the Chairman. The presentation concerned the Commission's proposals in GN Docket 93-252 to change the regulatory treatment of mobile services. A copy of the presentation is attached.

The original and one copy of this notice are being filed for inclusion in this docket.

Should any questions arise concerning this notification, please communicate with the undersigned.

Cordially yours,

Sean A. Stokes
Staff Attorney

cc: Karen Brinkmann
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January 26, 1994

Karen Brinkmann, Esq.
Legal Advisor to the Chairman
Federal Communications Commission
1919 M Street, N.W., Room 814
Washington, D.C. 20554

Re: GN Docket No. 93-252

Dear Karen:

Following-up on Chairman Hundt's request at our January 21, meeting, enclosed are UTC's recommendations regarding "forbearance" and other issues related to the Commission's on-going "regulatory parity" proceeding, GN Docket No. 93-252.

In order to address the issue of forbearance, it is first necessary to properly define those services that comprise "private mobile services" under the revised provisions of Section 332 of the Communications Act, and which therefore fall outside the scope of Title II obligations. Quite frankly, UTC is concerned that in its haste to meet the statutory deadline for regulatory parity rules, the Commission may adopt an overly broad definition of Commercial Mobile Services.

The FCC must be careful not to ignore its other statutory mandates to promote use of radio for safety of life and property (Section 1 of the Communications Act) and to encourage the larger and more effective use of radio in the public interest (Section 303 of the Communications Act). A decision to define Commercial Mobile Services in an over-inclusive manner could have a detrimental impact upon the ability of public safety and public service entities to meet their core public service obligations. Moreover, such a decision would be contrary to sound spectrum management and could deter private investment in more efficient communications technologies. The attached recommendations provide for a balanced approach to regulatory parity that will allow the Commission to meet the intent of Congress to create "regulatory parity" between competitive cellular-like commercial mobile services, without hampering the private land mobile radio environment.

Thank you for your attention to this important matter. Please let me know if we can provide any further information.

Cordially yours,

Charles M. Meehan
Executive Director

Enclosure

REGULATORY PARITY RECOMMENDATIONS

I. AVOID AN OVERLY BROAD DEFINITION OF COMMERCIAL MOBILE SERVICE

In interpreting revised Section 332 of the Communications Act, the FCC should confine its focus to those services for which regulatory parity is needed -- competitive services such as cellular, enhanced specialized mobile radio (ESMR) and personal communications services (PCS). The Commission should not attempt to exceed Congressional intent and impose a new regulatory regime by adopting an overly broad definition of Commercial Mobile Services (CMS).

Under the Budget Act a mobile service will be classified as a "commercial mobile service" if it meets two criteria: the service (1) is "provided for profit;" and (2) makes "interconnected service" available "to the public" or "to such classes of eligible users as to be effectively available to a substantial portion of the public."

A. For-Profit Service Does Not Include

1. Internal, Private Use Systems

The FCC should categorically exempt traditional private land mobile radio services in which licensees operate mobile radio systems solely for their own private, internal uses, such as utilities, governmental agencies, pipelines and public safety entities. All such services are clearly operated on a not-for-profit basis, and thus outside the scope of CMS.

2. Shared Systems

Shared systems operated on a cost-sharing or non-profit basis, under which a licensee offers reserve capacity to unlicensed eligible users or where each user of the licensed facility is individually licensed, should continue to be treated as private mobile services since they operate on a "not-for-profit" basis. This approach is consistent with the language of revised Section 3(n), which provides that "private" communications systems may be licensed on an "individual, cooperative, or multiple basis" (emphasis added). Such licensing allows regional utilities and other public safety/public service entities with common communications requirements to take advantage of economies of scale. For example, the Lower Colorado River Authority (LCRA) a state-owned public utility, is in the process of implementing a digital trunked radio system throughout a large part of Texas. LCRA intends to make a portion of its system available to municipal utilities within its service territory on a non-profit basis, in order to provide enhanced communications capabilities in rural Texas. Absent such an arrangement it is doubtful that advanced communications capabilities will be available in parts of LCRA's service area.

The ability to license a system on a shared-use basis also facilitates the formation of utility "mutual aid networks." For example, approximately 28 utilities have formed a non-profit cooperative organization, the Utility Cooperative Communications Service (UCCS), which has applied for a nationwide non-commercial license in the 220-222 MHz band. The primary use of this system will be to allow for the coordination of relief and restoration efforts, between and among numerous utilities in response to major emergencies and natural disasters (e.g., earthquakes, hurricanes).

Similarly, entities involved in a non-profit cost shared system should be able to employ a system manager without subjecting the underlying licensee(s) or the system manager to regulation as a CMS provider. Such regulation is clearly unwarranted, and would be analogous to subjecting a non-profit charity or association to tax liability because it chooses to employ a management service bureau to administer the day-to-day functions of the organization. The fee charged by a system manager is a cost that is shared by the system users and is in the nature of an operational expense. Further, it would make little sense to subject the manager to CMS obligations since the manager has no direct control over the system license and has no authority to bind the underlying shared system owners to Title II provisions.

3. Leasing of Reserve Capacity

The FCC should also allow "non-commercial" private radio licensees to lease a limited amount of reserve capacity without being deemed to be a CMS provider. UTC recommends that the majority of the system (e.g., as measured by mobile loading, erlangs, etc.) should be used to meet the licensee's own internal requirements and that none of the leased facilities are used to meet the licensee's basic loading requirements. Such an approach will promote greater spectrum efficiency and will encourage investment in more advanced technologies by private land mobile radio licensees, as is contemplated by the "refarming" proposals contained in PR Docket No. 92-235. In the Notice of Proposed Rulemaking in PR Docket No. 92-235 the FCC specifically proposed that a Private Land Mobile licensee should be able to lease reserve capacity provided that a majority of the system is used to meet internal requirements. Few utilities would be willing to enter into leasing arrangements if doing so rendered them subject to even minimal common carrier obligations. Therefore many of the FCC's spectrum efficiency initiatives contained in "refarming" could be lost if the leasing of reserve capacity is not allowed on a private basis.

REGULATORY PARITY RECOMMENDATIONS, CON'T.

B. Limited Eligibility Services Are Not Effectively Available To A Substantial Portion Of The Public

Under revised Section 332, CMS must be made "available to the public or to such classes of eligible users as to be effectively available to a substantial portion of the public (emphasis added)." This would indicate that services which have significant eligibility rules that restrict service to small or specialized user groups (e.g., Power, Petroleum or Public Safety Services), were not intended to be included in the definition of Commercial Mobile Service. Such a distinction would appear to be the best means of addressing Congress' concern with regard to creating regulatory parity between services that are available to the public generally (e.g., cellular/PCS) and those that are effectively available to a substantial portion of the public (e.g. ESMRs), while at the same time preserving the private regulatory treatment of land mobile radio services that are necessarily restricted to use by limited portions of the public.

For example, many utilities require extensive trunked radio systems in order to meet their public service obligations. Such facilities often provide a limited amount of reserve capacity that could be leased to other utilities thereby lowering the total cost that has to be passed on to utility ratepayers. As required by the FCC's Rules,[1] the use of reserve capacity is limited to entities that would themselves be eligible for licensing within the specific service category (e.g., only other Power Service eligibles could lease reserve capacity from a utility). Since such arrangements are not effectively available to the general public, they are outside of the statutory definition of CMS.

Imposition of Title II obligations to indiscriminately serve the public would conflict with current Rules that restrict the licensee to serving only like-kind users. Further, a requirement to provide service indiscriminately could force a licensee to provide service to incompatible users; e.g., a utility would not want to share capacity with other entities that would make heavy use of the radio system during storm emergencies. Therefore, classifying such arrangements as CMS could in fact discourage efficient use of private land mobile spectrum and detrimentally impact the nation's private land mobile radio equipment market, by deterring the substantial investment necessary to implement such systems.

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[1] 47 C.F.R. § 90.179

REGULATORY PARITY RECOMMENDATIONS, CON'T.

II. THERE SHOULD BE MINIMAL APPLICATION OF TITLE II REGULATIONS TO COMMERCIAL MOBILE SERVICES

While revised Section 332 requires that any entity providing CMS be treated as a common carrier subject to Title II of the Communications Act, the Budget Act authorizes the Commission to exempt some or all Commercial Mobile Services from regulation under any provision of Title II other than Sections 201 (offer service on reasonable request/reasonable charges), 202 (make no unreasonable discrimination in service) and 208 (complaint enforcement mechanism).

Given the ever increasing number of competitive Commercial Mobile Service providers (cellular, ESMR and PCS) the FCC should attempt to proceed from the minimum amount of regulation that exists today. Such an approach would be consistent with the Administration's vision of the National Information Infrastructure (NII), as outlined by Vice President Albert Gore, that there is a need to reduce regulations for telecommunications providers that lack market power.

As a general matter, the FCC should forebear from imposing as many Title II provisions on the regulation of Commercial Mobile Services as possible. A regulatory philosophy of "less is more" will help to ensure that smaller entrepreneurs and new communications entrants will be able to develop competitive Commercial Mobile Services. The market, and not regulatory fiat, should shape the commercial mobile service industry.

The FCC should forbear from regulations that impose high administrative burdens without a significant offsetting public benefit. Accordingly only the three statutorily mandated provisions of Title II should apply to Commercial Mobile Services, since these provisions alone are sufficient to meet the public interest requirements specified in Sections 332(C)(1)(A) i,ii and iii of the revised Act. The FCC will retain the ability to impose additional regulations at a later date if warranted.